Supreme Court, U.S.
FILED
APR 25 2003
OFFICE OF THE CLERK

No. 02-1431

IN THE

Supreme Court of the United States

THOMAS R. SPAHR and WINONA BENDON,

Petitioners,

v.

RESORTS INTERNATIONAL HOTEL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

BRIEF IN OPPOSITION

JOSEPH P. LASALA
Counsel of Record
JOHN T. COYNE
MCELROY, DEUTSCH
& MULVANEY, LLP
Attorneys for Respondent
1300 Mt. Kemble Avenue
P.O. Box 2075
Morristown, NJ 07962-2075
(973) 993-8100

180513

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

23 pp

QUESTIONS PRESENTED

1. May petitioners seek review of a state court decision in which no federal question was raised or decided in violation of 28 U.S.C. § 1257?

2. May petitioners seek review of a state court decision that was decided on independent and adequate state grounds?

3. Are the equal protection and due process clauses of the Fourteenth Amendment implicated by state law handicap discrimination claims against a private corporation?

CORPORATE DISCLOSURE STATUS

Respondent Resorts International Hotel, Inc. d/b/a Resorts Atlantic City ("Resorts") is a wholly owned subsidiary of Resorts International Hotel and Casino, Inc.

TABLE OF CONTENTS

	Page
Questions Presented	i
Corporate Disclosure Status	ii
Table of Contents	iii
Table of Cited Authorities	v
Opinions Below	1
Statement of Jurisdiction	1
Counterstatement of the Case	1
Statement of Material Facts	2
A. Background	2
B. Facts Relating to Bendon	3
C. Facts Relating to Spahr	5
D. Dr. Nagler's Opinions	6
Reasons for Denying the Writ	9
I. The Federal Questions Were Not Argued Or Decided Below	9

Contents

Page

II. The Decision Below Was Decided On Independent State Grounds, Depriving This Court Of Jurisdiction 14

III. Because Resorts Is A Private Entity, The Equal Protection And Our Process Clauses Of The Fourteenth Amendment Cannot Form The Basis Of A Claim Against Resorts 15

Conclusion 16

TABLE OF CITED AUTHORITIES

Page

Cases:

American Mfrs. Ins. Co. v. Sullivan, 526 U.S. 40 (1999) 15

Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) 10, 11, 12, 13

Blum v. Yaretsky, 451 U.S. 991 (1982) 15

Caldwell v. Mississippi, 472 U.S. 320 (1985), *cert. denied*, 479 U.S. 1075 (1987) 14

Cardinale v. Louisiana, 394 U.S. 437 (1969) 10, 11

Dewey v. Des Moines, 173 U.S. 193 (1899) 11

Illinois v. Rodriguez, 497 U.S. 177 (1990) 14

Montgomery Bldg. & Constr. Trades Council v. Ledbetter Erection Co., 344 U.S. 178 (1952) ... 12

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928) 12-13

New York Times Co. v. Jascalevich, 493 U.S. 1331 (1978) 10

North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973) 11-12

Cited Authorities

Page

Perry v. Thomas, 482 U.S. 483 (1987) 10

Radio Station WOW v. Johnson, 326 U.S. 120 (1945) 12

Rigging v. Nevada, 504 U.S. 127 (1992) 10

Shelley v. Kraemer, 334 U.S. 1 (1948) 15

Street v. New York, 374 U.S. 576 (1968) 10, 12, 13

TXO Prod. Co. v. Alliance Resources Corp., 509 U.S. 443 (1993) 10

United States v. Morrison, 529 U.S. 598 (2000) ... 15

Webb v. Webb, 451 U.S. 493 (1981) ..... *passim*

Yee v. City of Escondido, 503 U.S. 519 (1992) 10

United States Constitution:

Eighth Amendment 10

Statutes:

28 U.S.C. § 1257 ..... *passim*

N.J.S.A. 10:5-1, *et seq.* 1

Rule:

Supreme Court Rule 14(1)(g)(i) 2, 11

Respondent, Resorts International Hotels, Inc., submits this brief in opposition to the Petition for Certiorari, which seeks a review of the decision of the Superior Court of New Jersey, Appellate Division.

OPINIONS BELOW

The New Jersey Supreme Court denied certification at 807 A.2d 194 (2002) by an Order contained in Appendix C of the Petition for Certiorari. In doing so, that court denied review of a judgment announced in an unreported opinion of the Superior Court of New Jersey, Appellate Division, Docket nos. A-4187-00T2 and A-4188-00T2, located at Appendix A to the Petition for Certiorari.

STATEMENT OF JURISDICTION

Petitioners, Winona Bendon and Thomas Spahr, claim jurisdiction under 28 U.S.C. § 1257. Their claim is unfounded. The federal questions raised by petitioners were neither argued nor decided below and therefore were not preserved for this Court's review. To the extent petitioners are seeking interpretation of the New Jersey Law Against Discrimination, ("LAD") N.J.S.A. 10:5-1, *et seq*., the petitioners do not raise any federal question. As a result, this Court is without jurisdiction to hear this matter.

COUNTERSTATEMENT OF THE CASE

Petitioners' recitation of the issues presented contains numerous factual and legal misstatements. Those misstatements include scurrilous and wholly unsubstantiated statements concerning the New Jersey judiciary and the casino industry. Because the record below demonstrates that the questions

presented are without merit and were never raised or adjudicated below as required under 28 U.S.C. § 1257 and relevant case law, as well as under Supreme Court Rule 14(1)(g)(i), the Court should deny the Petition for Certification.

First, no issue relating to equal protection or due process was argued or decided below. Second, the state courts below decided this action on independent state grounds. The sole issue below was whether petitioners had made a prima facie case of handicap discrimination under the LAD. The courts below found that petitioners had failed to present competent evidence that the earpieces they were required to wear at work caused or exacerbated a condition known as tinnitus. Third, there is no evidence of any State action triggering the protections of the equal protection and due process clauses insofar as they relate to the claims against Resorts.

STATEMENT OF MATERIAL FACTS

A. Background

Resorts hired Winona Bendon as a slot attendant on August 14, 1995. (Pet Bendon's App. Div. Apx. at PBa1.) Slot attendants work on the casino floor and are primarily responsible for tending to the slot machines (*i.e.*, filling empty machines, fixing minor machine malfunctions) and assisting customers (*i.e.*, paying off jackpots and answering questions). (*Id.* at PBa17).

Thomas R. Spahr was first hired by Resorts as a pit clerk on April 29, 1993, but was terminated on July 29, 1993 for failing to meet his job requirements. Resorts hired Spahr as a slot attendant on August 9, 1993. (Pet. Spahr's App. Div. Apx. at PSa166.)

All Resorts casino personnel, including slot attendants, must use radios to communicate with one another and their operation's base. (Pet. Bendon's App. Div. Apx. at PBa18.) Casino employees use short-wave, hand-held ("walkie-talkie") radio units that have channel and volume adjustment controls. Radio communication among Resorts personnel is nearly constant.

On November 5, 1997, Resorts implemented the use of an earpiece attachment to the radios used by Resorts personnel. (*Id.* at PBa28.) The earpiece has a one-inch in diameter foam piece, which goes against the ear and a rubber or plastic piece which goes behind the ear. (*Id.* at PBa20.)

Resorts' decision to require slot attendant employees to use an earpiece was prompted by both security and customer service concerns. When the radio is worn without an earpiece, the casino customers can hear all conversations between casino employees. (*Id.* at PBa19.)

B. Facts Relating to Bendon

On or about October 8, 1997, one month before Resorts issued an earpiece to Bendon or anyone else in the slot department, Bendon wrote a memorandum to the Resorts' slot department management outlining her concern that the use of the radio, particularly with an earpiece, posed a danger to her health due to hazardous over-exposure to electro-magnetic waves. (*Id.* at PBa29.)

When Resorts formally issued earpieces to the slot department on November 5, 1997, Bendon refused to wear the earpiece and for the first time claimed, without trying on the earpiece, that she had tinnitus and that use of the earpiece would exacerbate her discomfort and cause hearing loss. (*Id.* at PBa22-23.)

Joanne Kraly, the slot department manager called Bendon to her office on November 7, 1997, gave Bendon a written warning of unsatisfactory performance and told Bendon that she must wear an earpiece with her radio or she would be written up again. (*Id.* at PBa33.)

Bendon called out sick on November 8th and 9th, 1997 and reported that she had a stomachache. (*Id.* at PBa34.) She was off from her job on November 10th and 11th, 1997. (*Id.*)

Bendon went to see her family doctor, Dr. Gary W. Raab, D.O., on November 11, 1997. Dr. Raab wrote a letter dated November 11, 1997, which was unsigned and said that Bendon should not wear the earpiece. (*Id.* at PBa36.)

Bendon returned to work from November 12 through November 16, 1997. (*Id.* at PBa34.) On November 12, 1997 Ms. Kraly met with Bendon and advised her of the departmental guidelines which required two hours notice of all sick calls. (*Id.* at PBa37.)

Resorts asked Bendon to submit to an evaluation with J. Patrick Clancy, Jr., M.D. Bendon was evaluated by Dr. Clancy on November 18, 1997. (*Id.* at PBa38.) Clancy advised Resorts that there was no medical reason for Bendon to be excused from wearing the earpiece. (*Id.*)

Bendon was absent from work on November 19, 1997-November 23, 1997. Her employment attendance records document that she was absent based on the "earpiece conflict." (*Id.* at PBa34.) Bendon continued to refuse to wear the earpiece. Bendon never tried to work at any time with the earpiece. (*Id.* at PBa21.)

Bendon met with Resorts personnel, Phil Mazzone and Joanne Kraly on November 25, 1997. (*Id.* at PBa39.) At the meeting Resorts told Bendon that her attendance records reflected six call-outs. Resorts told Bendon that they did not wish to terminate her, but that it was a condition of her employment that she wear an earpiece. (*Id.* at PBa39.) Resorts further advised Bendon that if she continued to call out of work, Resorts would have no alternative but to terminate her employment. (*Id.*)

At the November 25, 1997 meeting, Bendon was offered the opportunity to take a personal leave, which would toll the time of her absences. She could then speak to an employment representative to determine if there was a suitable position available at Resorts that did not require her to wear an earpiece. (*Id.* at PBa39; PBa27.) Resorts discussed a position which was available in the slot bank department with Bendon, however, she was not interested in the position. (*Id.*)

Bendon was discharged for excessive absenteeism on December 5, 1997. (*Id.* at PBa41, 42.) Resorts received a report from Bendon's physician, Dr. Matlick, an otolaryngologist, on December 8, 1997. (*Id.* at PBa43.)

C. Facts Relating to Spahr

Spahr acknowledged receipt of his earpiece on November 5, 1997. Spahr wore the earpiece for his shift on November 5, 1997 without incident. (Pet. Spahr's App. Div. Apx. at PSa81.)

On or about November 6, 1997, Spahr objected to wearing the earpiece, stating that he had tinnitus and that the

earpiece aggravated his condition. (*Id.* at PSa61.) At Resorts' request, J. Patrick Clancy, Jr., M.D., evaluated Spahr on December 9, 1997. Dr. Clancy determined that there was no medical reason for Spahr to be excused from wearing the earpiece. (*Id.* at PSa38.)

Mr. Spahr submitted a prescription form to Resorts from Dr. Ansel, M.D., which was dated December 9, 1997 and said that Mr. Spahr, "should not be required to wear headphones at work." (*Id.* at PSa135.)

Resorts advised Mr. Spahr that he would need to wear the earpiece if he wished to remain employed as a slot attendant. Although Resorts did not find that Mr. Spahr had a "handicap" under the LAD, Resorts gave Mr. Spahr the opportunity to take a leave of absence for thirty days to locate another position at Resorts and offered to let Mr. Spahr wear a different earpiece. PSa65. Mr. Spahr rejected these offers.

Since November 9, 1997, Mr. Spahr has worn the earpiece, although he claims that wearing the earpiece increases his bouts of tinnitus, gives him headaches and generally makes him uncomfortable at his job. (*Id.* at PSa70-71.)

D. Dr. Nagler's Opinions

Plaintiffs retained Stephen N. Nagler, M.D., FACS, as an expert in their cases. Dr. Nagler is not an otolaryngologist (an ear, nose and throat specialist), or an otologist (an ear treatment specialist), but is a surgeon by training, who specialized in general surgery, colorectal surgery and breast surgery. (*Id.* at PSa51.) Dr. Nagler switched careers three years ago, and is now the director of the Alliance Tinnitus Center in Atlanta, Georgia. (*Id.* at PSa50.)

Dr. Nagler concluded in his August 14, 2000 report that plaintiffs suffered "severe intrusive tinnitus" and that they should not wear the earpieces. (*Id.* at PSa60.) Dr. Nagler's conclusion that plaintiffs have severe tinnitus lacks factual support since Dr. Nagler never examined plaintiffs, (*id.* at PSa50), never visited the Resorts Casino, *Id.*, never examined the earpieces plaintiffs were asked to wear or measured the amount of sound that would come from the earpiece. (*Id.* at PSa53). Dr. Nagler further did not know if the pitch of the sound that comes from the earpiece is higher or lower than the environmental sound around it. (*Id.* at PSa54.)

Dr. Nagler further could not determine that plaintiffs' tinnitus was severe or intrusive since tinnitus itself cannot be objectively measured. (*Id.* at PSa50.) Dr. Nagler admitted that he diagnoses patients solely based on what the patient tells him. (*Id.* at PSa55.) Dr. Nagler further admitted that there is no test to determine the severity of tinnitus and that "some patients are exaggerators, some patients are minimizers." (*Id.* at PSa54.) Dr. Nagler testified that reliability tests can be performed to determine within a high degree of probability whether or not a person actually has tinnitus. (*Id.* at PSa57.) Dr. Nagler admitted that he did not perform a reliability test on plaintiffs, therefore, by his own admission, Dr. Nagler cannot conclusively determine that plaintiffs have tinnitus and cannot accurately quantify the level of their tinnitus.

Dr. Nagler testified that tinnitus itself does not cause hearing loss and that hearing loss does not cause tinnitus. (*Id.* at PSa56.) Dr. Nagler denied than any person with tinnitus is "handicapped" as defined by the LAD. (*Id.* at PSa58.)

Dr. Nagler admitted at deposition, that since Bendon never actually tried to wear the earpiece, he could not render an opinion as to whether or not Bendon should be excused from wearing an earpiece at Resorts. At deposition, Dr. Nagler was asked by counsel for Resorts:

> Q. Is it your opinion that Ms. Bendon should not wear the earpiece in this case?
>
> A. Yes.
>
> Q. What is your opinion based on?
>
> A. My opinion is based — Okay. My opinion is that if the — Let me change that. Thank you. My opinion is that if she tries to use the earpiece and if it aggravates her tinnitus, that she shouldn't use the earpiece. My opinion is if she tries to use the earpiece and the noise level from the earpiece violates OSHA regulations, she shouldn't wear the earpiece. But without having tried the earpiece herself and reporting it, I don't have an opinion.
>
> Q. Is that because every individual is different? You'd have to speak to them about the impact of trying something versus not trying it?
>
> A. Yes.

(Pet. Bendon's App. Div. Apx. at PBa59.)

As part of discovery in this case, defendant's expert, Dr. Joseph Sataloff, M.D. measured the noise levels in the casino and found them to be well within OSHA regulations.

(*Id.* at PBa46.) Dr. Sataloff further observed that Bendon never actually tried to work with the earpiece and that typically tinnitus is treated by the use of an earpiece device, which acts as a noise masker. (*Id.*)

Dr. Nagler also concludes that Spahr's tinnitus created a "concentration impediment" which affected his "concentration" and thus, his ability to perform his job. (Pet. Spahr's App. Div. Apx. at PSa57.) Dr. Nagler alleges that he reviewed Spahr's deposition testimony to determine that Spahr has a "concentration impediment." (*Id.*)

Nowhere in Spahr's deposition does Spahr describe that his tinnitus condition makes it difficult for him to concentrate at work. (*Id.*) Thus, Dr. Nagler lacks any basis to conclude that Spahr suffers a "concentration impediment" from his tinnitus condition. Dr. Nagler also admitted that he could not diagnose the underlying cause of Mr. Spahr's tinnitus. (*Id.* at PSa57.)

REASONS FOR DENYING THE WRIT

I.

THE FEDERAL QUESTIONS WERE NOT ARGUED OR DECIDED BELOW

For this Court to review the final judgment of a state court, some question of federal law must have been presented below. "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-97 (1981). Indeed, where the opinion below does not "'pass upon'" some

federal question, this Court will "'assume[] that the omission was due to want of proper presentation in the state courts.'" *Id.* at 495 (quoting *Street v. New York*, 374 U.S. 576, 582 (1968)). The Court thus "decline[s] to reach" claims "not raised and passed upon in state court." *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77 (1988); *accord TXO Prod. Co. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) (refusing to consider constitutional attack on jury instructions not raised in highest state court below); *Rigging v. Nevada*, 504 U.S. 127, 133 (1992) (declining to reach Eighth Amendment claim not raised before Nevada Supreme Court); *Yee v. City of Escondido*, 503 U.S. 519, 533-34 (1992) (declining to reach substantive due process claim not raised below due to lack of jurisdiction under 28 U.S.C. § 1257); *Perry v. Thomas*, 482 U.S. 483, 492 and n.9 (1987) (refusing to decide standing and unenforceability issues not raised below); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) ("[T]he Court will not decide federal constitutional issues raised here for the first time on review of state court decisions."). Indeed, "[t]he Court has consistently refused to decide federal constitutional issues raised here for the first in review of state court decision." *Cardinale*, 394 U.S. at 438.

Preservation of the federal question in the state proceeding from which review is sought is a necessary element of this Court's jurisdiction under 28 U.S.C. § 1257. *Yee*, 503 U.S. at 533 (discussing preservation of federal claim in state proceedings as requirement of "jurisdictional grant of 28 U.S.C. § 1257"); *Webb*, 451 U.S. at 495 (requiring, as matter of jurisdiction, petitioner to raise Constitutional claim in state court); *New York Times Co. v. Jascalevich*, 493 U.S. 1331, 1332 (1978) (discussing 28 U.S.C. § 1257 as jurisdictional basis for review). Determining whether an issue was properly preserved is a federal question for this Court to decide. *Street*, 394 U.S. at 593. A state court decision cannot be said to have passed on

federal questions that were never raised before it. *Bankers Life*, 486 U.S. at 79 n.2 ("'A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it.'" (quoting *Dewey v. Des Moines*, 173 U.S. 193, 200 (1899))). Therefore, the Supreme Court Rules require a petitioner seeking review of a state court judgment to specify, with specific citations to the record below, when federal questions were raised below and how the state court below passed on them. Sup. Ct. R.14.1(g)(i); *accord Webb*, 451 U.S. at 495 (discussing former R.21.1(h)).

Underlying the requirement that federal questions be first raised in state court proceedings are "powerful policy considerations." *Webb*, 451 U.S. at 499. Those considerations include "comity to the States" and "a constellation of practical considerations." *Bankers Life*, 486 U.S. at 79. Comity to the states stems from the need to allow state courts an opportunity to defend state law from federal challenges in order to preserve states' independent functioning and to allow them to construe state law so as to avoid challenges under federal grounds. *Webb*, 451 U.S. at 499-500. The "practical considerations" involve the proper development of the record below, which is necessary for correct adjudication of the federal questions raised before this Court. *Bankers Life*, 486 U.S. at 79; *Webb*, 451 U.S. at 500; *Cardinale*, 394 U.S. at 439 ("Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not complied with those questions in mind."). Also, litigation of the federal issues in state courts permits adjudication under state law, which "may well obviate any reason for [this court] giving plenary consideration to the case." *Webb*, 451 U.S. at 501; *accord Cardinale*, 394 U.S. at 439; *see also North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*,

414 U.S. 156, 159 (1973) (stating that "finality requirement" of 28 U.S.C. § 1257 prevents "piecemeal review" of state court decision; avoids advisory opinions; and minimizes "federal intrusion into state affairs" by limiting review of state-court decisions).

As is clear, the requirement under 28 U.S.C. § 1257 that a federal question be raised and addressed by the state court below is no mere "'technicalit[y] to be easily scorned.'" *Montgomery Bldg. & Constr. Trades Council v. Ledbetter Erection Co.*, 344 U.S. 178, 180 (1952) (quoting *Radio Station WOW v. Johnson*, 326 U.S. 120, 124 (1945)). The minimum requirement for jurisdiction under 28 U.S.C. § 1257 is that the record must make clear that a claim under a federal statute of the Federal Constitution "'was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.'" *Bankers Life*, 486 U.S. at 77-78 (quoting *Webb*, 451 U.S. at 501). Moreover, the federal claim must have presented to the state courts with sufficient specificity. A "vague appeal to constitutional principles does not preserve [an] appellant's [constitutional] or due process claims. A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon." *Id.* at 77.

Thus, for this Court to reach the merits of a federal question arising out of state court proceedings, the record must "clearly show[] that the federal issue has been properly raised below." *Id.* at 499. Specifically, the claim must "'be brought to the attention of the state court with fair precision and in due time,'" which is accomplished "if the record as a whole shows whether expressly or by clear intendment" the federal question was properly raised. *Street*, 394 U.S. at 584 (quoting *New York*

ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928)). The Bankers Life Court referred to that requirement as "the 'not pressed or passed upon below' rule." 486 U.S. at 79.

As a result of that failure to raise federal questions in the state court proceedings, petitioners have failed to give the New Jersey court system an opportunity to defend its state laws against the challenge on federal issues that they now raise before this Court. *See Webb*, 451 U.S. at 499-500. Moreover, the record below is devoid of evidence, argument, and state-court reasoning on the subject, so that correct adjudication by this Court is impossible. *See Bankers Life*, 486 U.S. at 79. This record does not even present a general reference to the Federal Constitution such as that present in *Bankers Life*, 486 U.S. at 77 (declining to find federal question jurisdiction based on allegation below that punitive damages award "violates constitutional principles"). The record below cannot be said to show, "'whether expressly or by clear intendment,'" that any federal question was properly raised in the state-court proceedings. *Street*, 394 U.S. at 584 (quoting *Bryant*, 278 U.S. at 67). As a result of petitioners' failure to preserve any federal claim in the state proceedings below, this Court is without jurisdiction to grant certiorari, and it must deny this Petition on that ground alone.

II.

THE DECISION BELOW WAS DECIDED ON INDEPENDENT STATE GROUNDS, DEPRIVING THIS COURT OF JURISDICTION

As this Court has stated, "[w]hen a state-court decision is clearly based on state law that is both adequate and independent, we will not review the decision." *Illinois v. Rodriguez*, 497 U.S. 177, 182 (1990). The presence of adequate and independent state grounds for a state-court decision presents a jurisdictional bar to this Court's review that must be considered before the Court can reach the merits of a case. *Id.* The Court can review a state-court decision only if that decision rests primarily on federal law or if state and federal law are "'interwoven'" such that "'the adequacy and independence of any possible state law ground is not clear from the face of the opinion.'" *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985), *cert. denied*, 479 U.S. 1075 (1987).

As the opinion of the New Jersey Superior Court, Appellate Division, makes clear, the decision below rests entirely on the application of state law. (Appendix A to Petition for Certification) The court below makes no reference to any federal question. Petitioners never raised such issues in the state-court proceedings below. Under *Rodriguez* and *Caldwell*, this Court is without jurisdiction to review the state court opinion below. As a result, it must deny this Petition for Certiorari.

III.

BECAUSE RESORTS IS A PRIVATE ENTITY, THE EQUAL PROTECTION AND OUR PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT CANNOT FORM THE BASIS OF A CLAIM AGAINST RESORTS

It is a "time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action." *United States v. Morrison*, 529 U.S. 598, 621 (2000) "The principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States." *Id.* "That amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Id.* (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 and n.12 (1948)).

In *American Mfrs. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999), this Court stated:

> [W]e have consistently held that 'the mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment.' Faithful application of the state action requirement in these cases ensures that the prerogative of regulating private business remains with the States and the representative branches, not the courts.

(Citations omitted). *Accord Blum v. Yaretsky*, 451 U.S. 991, 1002-03 (1982).

Resorts is a private entity. Its actions cannot be regarded as those of the State. Accordingly, petitioners' constitutional claims cannot succeed.

CONCLUSION

For the reasons set forth above, the Court should deny the Petition for Certiorari.

Respectfully submitted,

JOSEPH P. LASALA
Counsel of Record
JOHN T. COYNE
MCELROY, DEUTSCH
& MULVANEY, LLP
Attorneys for Respondent
1300 Mt. Kemble Avenue
P.O. Box 2075
Morristown, NJ 07962-2075
(973) 993-8100